United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-7434

To be argued by
HERBERT M. WACHTELL

B

P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

In Re Franklin National Bank
Securities Litigation

JOSEPH J. KANNER, SOL NEIL CORBIN, as Trustee In Bankruptcy For FRANKLIN NEW YORK CORPORATION,

and *Plaintiffs,*

FEDERAL DEPOSIT INSURANCE CORPORATION, Successor In Interest To FRANKLIN NATIONAL BANK,

against *Plaintiff-Appellee,*

RAYMOND T. ANDERSEN, JOSEPH A. BEISLER, CARLO BORDONI, HOWARD D. CROSSE, HAROLD V. GLEASON, WILLIAM J. HOGAN, SOL KITTAY, CHARLES H. KRAFT, WILLIAM B. LEWIS, JR., PAUL LUSTIG, MICHAEL J. MERKIN, NORMAN B. SCHREIBER, ROBERT N. SEARS, PETER R. SHADDICK, MICHELE SINDONA, JAMES C. SLAUGHTER, JAMES G. SMITH, JOHN J. TUOHY, FRANK G. WANGMAN, HAROLD A. WEBSTER, FASCO INTERNATIONAL HOLDING, S.A. INC., *Defendants,*

and

LOEWS CORPORATION,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLANT LOEWS CORPORATION

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BRIEF ON BEHALF OF DEFENDANT-APPELLANT LOEWS CORPORATION

Issues Presented for Review

1. Does 12 U.S.C. § 1819 permit removal of an action to which the Federal Deposit Insurance Corporation ("FDIC") is a party without the joinder of all defendants in the removal petition pursuant to the requirements of 28 U.S.C. § 1446?

2. Does 12 U.S.C. § 1819 permit removal by the FDIC where the FDIC is a party-plaintiff?

Statement of the Case

Preliminary Statement

This is an appeal by permission of this Court, pursuant to 28 U.S.C. § 1292(b) and Rule 5 of the Federal Rules of Appellate Procedure, from the Memorandum and Order of the Honorable Orrin G. Judd of the United States District Court, Eastern District of New York, filed on June 30, 1975, which denied plaintiff Kanner's motion, insofar as it was joined by defendant Loews Corporation (sued as Loews, Inc.) ("Loews")*, to remand this action to

* After Loews had joined in the removal motion, plaintiff Kanner - the original moving party - voluntarily withdrew the motion on his part, see p. 10 infra.

the Supreme Court, New York County. The District Court held that:

(a) 12 U.S.C. § 1819 is a special removal statute designed to give special removal rights to the FDIC and consequently, the requirement of 28 U.S.C. § 1446 that all defendants join in a removal petition is not applicable; and

(b) 12 U.S.C. § 1819 gives the FDIC the right to remove any civil action to which the FDIC is "a party", and consequently the FDIC could remove as a realigned party-plaintiff.

The District Court's Memorandum and Order are set forth in full at pages A59-A69 of the Joint Appendix.*

The opinion below expressly acknowledges that "the order denying removal involves a controlling question of law as to which there is a substantial ground for dif-

* References herein bearing the prefix letter "A" are to the Joint Appendix.

ference of opinion" as to whether the District Court had removal jurisdiction over the Kanner action (A68) and that "this is a case of first impression under the FDIC removal statute [12 U.S.C. § 1819]." (A66). Accordingly, the District Court certified the issue of the "court's jurisdiction" for an immediate appeal, pursuant to 28 U.S.C. § 1292(b)(A68). On July 21, 1975, this Court granted Loews' leave to appeal to this Court.

Statement of Facts

A. The Complaint

This action presents an unusual procedural posture. The action was commenced in August 1974, in the Supreme Court of New York, New York County, against 24 defendants including Loews. Plaintiff, an alleged stockholder of Franklin New York Corporation ("Franklin Corporation"), purports to bring this action both as a derivative action on behalf of Franklin Corporation and a double derivative action on behalf of Franklin Corporation's subsidiary, Franklin National Bank ("Franklin Bank"), to

obtain redress for numerous allegedly improper acts of mismanagement committed by officers and directors of those corporations (A3, A5-A8). The officers and directors are charged with having permitted defendant Michele Sindona ("Sindona") and defendant Fasco International Holding, S.A. ("Fasco"), a corporation controlled by Sindona, to obtain control of Franklin Bank, to make improvident loans in excessive amounts, to participate in underwritings for the benefit of Sindona and Fasco, to conduct imprudent, wasteful and illegal foreign exchange transactions resulting in losses in excess of $45,000,000, and to threaten the solvency of Franklin Bank (A6-A10, A61).

With respect to Loews, plaintiff specifically alleges that:

(a) Loews received an illegal and improper premium of $5,000,000 when it sold its 22% stock interest in Franklin Corporation to Fasco (A11), and

(b) Loews sold such stock to Sindona and Fasco without proper investigation into their true intent to act to the detriment of the Franklin Corporation and Franklin Bank (A11, A12).

The claims set forth in the complaint are based exclusively upon state law (A3-A12).

B. FDIC Substituted for Franklin Bank; Trustee Elected for Franklin Corporation

On October 8, 1974, the United States Comptroller of the Currency declared Franklin Bank insolvent and appointed the FDIC as receiver of Franklin Bank (A17, A18). FDIC thereafter moved in the state court to be substituted as a defendant in the place of Franklin Bank, upon behalf of which the action was brought, which motion was granted on December 5, 1974 (A13, A14, A26). On October 16, 1974, Franklin Corporation filed a voluntary petition in bankruptcy in the United States District Court for the Southern District of New York (R-Opinion and Order dated April 30, 1975 of the Judicial Panel on Multidistrict Litigation at p. 1).* On November 12, 1974, Sol Neil Corbin was elected Trustee. Pursuant to the provisions of the Bankrupcty Act, the Trustee has taken control of all the affairs of Franklin Corporation (A71, A72).

C. Removal and Motion to Remand

On December 12, 1974 the FDIC filed a petition for removal in the Southern District alleging that this Kanner

* References herein bearing the prefix letter "R" are to the Record on Appeal

action was removable primarily pursuant to 12 U.S.C. § 1819, a statute which provides in essence that any civil action to which the FDIC is a party shall be deemed to involve a federal question and that the FDIC has the right to remove such action to Federal court (A23, A24, A62).* No other defendant joined in FDIC's petition for removal (A62). On December 16, 1974, plaintiff Kanner, pursuant to 28 U.S.C. § 1447(c), filed a motion for an order remanding the action to Supreme Court, New York County (A27, A62). On January 13, 1975 Loews filed a memorandum of law in support of the motion to remand (A62).

D. Multidistrict Order

On April 30, 1975, the Judicial Panel on Multidistrict Litigation ordered that all of the litigation involving Franklin Corporation and Franklin Bank pending in the Eastern and Southern Districts of New York be transferred to the Eastern District for "coordinated or consolidated pretrial proceedings, pursuant to 28 U.S.C. § 1407." (A62) With respect to the then pending motion to remand this Kanner action, the Multidistrict Panel stated that the transferee judge could resolve the remand issue (A62).

* Additionally, the FDIC also purported to remove the Kanner action pursuant to 28 U.S.C. § 1348, which provides that certain categories of civil actions are within the original jurisdiction of the Federal district court, and 28 U.S.C. § 1441(b), the general removal statute (A24).

The actions covered by the ruling of the Multidistrict Panel included four derivative actions on behalf of Franklin Corporation shareholders,* five alleged class actions by purchasers of Franklin Corporation securities,** and an injunction action by the Securities and Exchange Commission.*** (A63; R-Opinion and Order dated April 30, 1975 of the Judicial Panel on Multidistrict Litigation at Schedule A.) All except the Kanner action were originally filed in either the Eastern District or the Southern District of New York. All but two of the 24 defendants in the Kanner action (Loews and Fasco) are also defendants in one or more of the other actions (A63).

E. Realignnment and Consolidation Motions

On June 9 1975, while the motion to remand the Kanner action was pending, the FDIC moved to realign itself

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* In addition to the Kanner action the derivative actions are: Rothman v. Andersen, 74-C-894 (E.D.N.Y.); Ratner v. Franklin National Bank, 74-C-1174 (E.D.N.Y.); and Pergament v. Franklin National Bank, 74-C-1451 (E.D.N.Y.).

** The class actions are: Mendes v. Sindona, 74-C-1256 (E.D.N.Y.); Pilcer v. Franklin New York Corp., 74-C-1372 (E.D.N.Y.); Stern v. Sindona, 74-C-1379 (E.D.N.Y.); Bookstein v. Franklin New York Corp., 74-C-4595 (S.D.N.Y.); Gold v. Ernst & Ernst, 74-C-4622 (S.D.N.Y.).

*** The Securities and Exchange Commission action is entitled Securities and Exchange Commission v. Franklin New York Corp., 74-C-4557 (S.D.N.Y.).

as party-plaintiff in the Kanner, Ratner and Rothman actions,* to be granted exclusive control over prosecution of the claims asserted therein on behalf of Franklin Bank, and to consolidate those actions for all purposes (A63).

Thus, by the day the remand motion was to be argued, June 13, 1975, the circumstances of the litigation had changed drastically from the time the remand motion had been made. As set forth above, the Judicial Panel on Multidistrict Litigation had ordered that the Kanner action be coordinated or consolidated for pretrial proceedings with nine other actions involving the demise of the Franklin Bank and its parent company Franklin Corporation and the FDIC was seeking to realign itself as party-plaintiff in the derivative action, to take exclusive control over prosecution of the claims asserted therein, and to consolidate those derivative actions, including this Kanner action, for all purposes. Further, upon the argument of the remand motion, the Trustee of Franklin Corporation advised the Court that the Trustee would, within the immediate future, move to substitute himself for Franklin

* On June 9, 1975 the FDIC moved to dismiss the Pergament action, also a derivative action, upon the ground that no proper demand had been made upon the FDIC before commencement thereof. On July 8, 1975, the Distict Court granted the FDIC motion (A2; R-Memorandum dated July 8, 1975 at p. 4)

Corporation in each of the derivative actions, realign himself as party-plaintiff, exercise exclusive control over the claims asserted on behalf of Franklin Corporation and move to dismiss the shareholder plaintiffs from the derivative actions (A32, A34).

F. Argument On Motion To Remand

At the June 13, 1975 argument on the motion to remand, counsel for plaintiff Kanner advised the court that because of the drastic change of circumstances as referred to above, plaintiff Kanner now preferred to stay in Federal Court, and therefore, plaintiff Kanner -- the original moving party -- was withdrawing the motion to remand (A34, A35).

During the course of the argument, counsel for Loews advised the court that Loews, too, had come to prefer (by reason, among others, of the changed circumstances referred to above, see pp. 8-10 supra) to have the Kanner action remain in the Federal Court. Nonetheless, counsel for Loews was obligated to advise the court that Loews continued to have serious reservations about the propriety of removal and as to whether the Federal Court had jurisdiction over the subject matter of the Kanner action. As stated by counsel for Loews:

> I'm here with mixed feelings. I want to be here and I don't think I'm entitled to be here. Frankly, I'm available to be of assistance to the Court, to respond. We of course, have briefed the issue fairly thoroughly, initially. The circumstances have somewhat changed, being rendered more complex by the motions that have been made by the FDIC, although not ruled upon yet, and the one [which] will be made by the bankruptcy trustee to realign. . . .
>
> * * *
>
> I have a serious question as to the propriety of removal here. That doubt has not gone away. I still have it. I think the question is a close one.
>
> (A37)

In light of the obligation of the District Court to satisfy itself regarding its own subject matter jurisdiction (See Fed. R. Civ. P. 12(h)(3)), counsel for Loews then proceeded to indicate to the District Court the problems created by the FDIC's petition to remove the Kanner action (A39, A40, A49-A52). Counsel for Loews recommended to the District Court that due to the extremely close question of whether the Federal Court has subject matter jurisdiction, a preferable alternative might be to deny remand and to certify an interlocutory appeal, since such procedure would prevent a potentially lengthy and complex litigation from going forward against Loews only to be rendered ultimately nugatory by reason of the absence of sub-

ject matter jurisdiction (A38, A39).*

The District Court then inquired of counsel as to who would petition the Court of Appeals in the event it denied the motion to remand and certified the question of the court's subject matter jurisdiction. In response, counsel for the FDIC indicated that the FDIC would not so petition. Counsel for Loews stated that Loews "would volunteer to intellectually brief the issues as amicus. It's something that should be decided." (A49)

G. Events Subsequent to Oral Argument

Subsequent to the oral argument, but prior to the District Court's decision on the motion to remand, the FDIC, the Trustee and Loews entered into a stipulation which stayed all proceedings against Loews in the Kanner action, until 20 days after notice shall have been given by the attorneys for the FDIC or the Trustee to the attorneys for Loews that the FDIC or the Trustee, as the case may be, wished to proceed with the prosecution of the claims asserted against Loews in this action (A2, R-Stipulation dated June 20, 1975). The purpose

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* The jurisdictional issue raised herein relates only to Loews and Fasco because all of the other defendants named in the Kanner action have been named in one or more of the actions involving the demise of the Franklin Bank, which other actions were commenced originally in Federal Court (A63).

of the stipulation was to enable the FDIC and Trustee to investigate the question as to whether there is any basis for the assertion of any claim or cause of action against Loews on behalf of Franklin Bank or Franklin Corporation. The FDIC, the Trustee and Loews also agreed in the stipulation that the claims or causes of action asserted in the Kanner action against Loews would not be consolidated with any of the claims or causes of action asserted against any of the other defendants in the Rothman and Ratner derivative actions for any purpose (A72).

On June 20, 1975, the District Court granted the motions of the Trustee and/or the FDIC: (a) to substitute the Trustee as a party in place of Franklin Corporation; (b) to realign the Trustee and the FDIC as party-plaintiffs in the Kanner, Rothman and Ratner derivative actions; (c) to vest in the FDIC and the Trustee respectively, exclusive control over the prosecution of the claims asserted therein on behalf of Franklin Bank and Franklin Corporation; and (d) to consolidate the Kanner, Rothman and Ratner actions for all purposes, except as modified by the foregoing stipulation so as to exclude from consolidation the claims asserted against Loews in the Kanner action (A70-A72).

H. Decision of the District Court

On June 24, 1975, the District Court, in a carefully reasoned Memorandum and Order, which was entered on June 30, 1975, denied the motion to remand insofar as the motion was joined in by Loews (A69). As set forth, the District Court found that the Kanner action was properly removed despite the fact that no other defendant joined in the FDIC's petition for removal (A62, A67-68) and despite the fact that, while the remand motion was pending, the FDIC's motion to be realigned as a party-plaintiff and to be given exclusive control over the prosecution of the claims asserted on behalf of Franklin Bank in this action was granted. The District Court held that 12 U.S.C. § 1819 is a special removal statute designed to give the FDIC special removal rights and by reason thereof, the requirement that all defendants join a removal petition, as provided in 28 U.S.C. § 1446, was not applicable. Further, the District Court held that 12 U.S.C. § 1819, as a special removal statute, gave the FDIC the right to remove this action as a realigned plaintiff. While holding that the Kanner action had been properly removed to Federal Court, the District Court accepted the suggestion of Loews' counsel and certified an interlocutory appeal from its denial of the remand motion (A68). By order dated July 21, 1975, this Court granted leave to appeal.

The Position of Loews

The position of Loews with respect to the motion to remand remains the same as it was in the District Court and in its application for leave to appeal to this Court. Loews does not desire remand of the Kanner action to the state court. Nonetheless, Loews believes that serious questions are presented with regard to the subject matter jurisdiction of the District Court. In accordance with its representation to the District Court that it would raise the issue of subject matter jurisdiction upon an appeal if certification of an interlocutory appeal were granted, Loews files this brief respectfully requesting that this Court determine the question of subject matter jurisdiction. It is Loews' position that the removal of this action presents very close questions of law as to whether the Federal Court has subject matter jurisdiciton over the Kanner action, as to which questions there is admittedly a substantial ground for difference of opinion. Further, Loews believes that this complex and potentially lengthly litigation should not go forward until the question of the Federal Court's subject matter jurisdiction has been decided. However, Loews must point out that in light of the stipulation entered into between Loews, the FDIC and the Trustee, see pp. 12-13 supra, there is no assurance that the claims

asserted against Loews will in fact be prosecuted by the FDIC and/or the Trustee. Moreover, if the FDIC and/or the Trustee decide to proceed with the prosecution of the claims asserted against Loews in this Kanner action, the FDIC could voluntarily dismiss this action and commence a new action based on the same claim in Federal Court. See Fed. R. Civ. P. 41(a).

Argument

POINT I

IT IS QUESTIONABLE WHETHER THE DISTRICT COURT WAS CORRECT IN HOLDING THAT THE JOINDER OF ALL DEFENDANTS IN THE FDIC's REMOVAL PETITION WAS NOT REQUIRED.

In seeking removal, the FDIC relied primarily upon 12 U.S.C. § 1819 which defines the powers of the FDIC. Thus, in its removal petition (A23), the FDIC alleges that "the action is one of which [the District Court] has original jurisdiction under the provisions of 12 U.S.C. § 1819, and is one which may be removed to this Court by the FDIC pursuant to the provisions of 12 U.S.C. § 1819." The pertinent portion of 12 U.S.C. § 1819 is as follows:

[T]he [FDIC] . . . shall have power --

> Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the [FDIC] shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and the [FDIC] may, without bond or security, remove any such action, suit, or proceeding, from a State court to the United States district court for the district or division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect, except that any such suit to which the [FDIC] is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States. (Emphasis supplied.)

The only "procedure for removal" set forth in the United States Code would appear to be that set forth in 28 U.S.C. § 1446. See, e.g., Weeks v. The Fidelity and Casualty Co. of N.Y., 218 F.2d 503, 504 (5th Cir. 1955); A. E. Staley Manufacturing Co. v. Fishback & Moore, Inc., 353 F. Supp. 578, 580, 581 (E.D. Pa. 1973); Kulbeth v. Woolnought, 324 F. Supp. 908, 909 (S.D. Tex. 1971); Yarbrough v. Blake, 212 F. Supp. 133, 136 (W.D. Ark. 1962); McCargo v. Steele, 151 F. Supp. 435, 436 (W.D. Ark. 1957); Burns v. Standard Life Insurance Co., 135 F. Supp. 904, 906 (D. Del. 1955); Mahony v. Witt Ice & Gas Co., 131 F. Supp. 564, 566-67 (W.D. Mo.

1955); Richlin Advertising Corp. v. Central Florida Broadcasting Co., 122 F. Supp. 507, 509 (S.D.N.Y. 1954). 28 U.S.C. § 1446 provides in relevant part:

> § 1446. Procedure for removal
>
> (a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon h m or them in such action.
>
> (b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter. (Emphasis supplied.)

As can be seen, 28 U.S.C. § 1446, which establishes the procedure for removal of actions to the Federal Courts, expressly requires that the petition for removal be made by the "defendant or defendants" seeking the removal. Moreover, it is well established that the statutory language requires that all defendants join in the petition

to remove. See In re Dunn, 212 U.S. 374, 386 (1909); Gableman v. Peoria, Decatur & Evansville Ry., 179 U.S. 335, 337 (1900); Chicago, R.I. & P.R. v. Martin, 178 U.S. 245, 248 (1900), Bradford v. Harding, 284 F.2d 307, 309 (2d Cir. 1960); Sheets v. Shamrock Oil & Gas Corp., 115 F.2d 880, 883 (5th Cir.); aff'd, 313 U.S. 100 (1941); Wright v. Missouri Pac. R.R., 98 F.2d 34, 35 (8th Cir. 1938); Bailen v. Deitrick, 84 F.2d 375, 376 (1st Cir.), cert. denied, 299 U.S. 579 (1936), Grenchik v. Mandel, 373 F. Supp. 1298, 1299, 1300 (D. Md. 1973); Van Slambrouck v. Employers Mutual Liability Insurance Co., 354 F. Supp. 366, 368 (E.D. Mich. 1973); A. E. Staley Manufacturing Co. v. Fishback & Moore, Inc., supra, at 581; Nowell v. Nowell, 272 F. Supp. 298, 299 (D. Conn. 1967); 1A J. Moore, Federal Practice ¶¶ 0.168 [3.-1], 0.168 [3.-2] at 443, 449 (2d ed. 1974).

Thus, putting aside the question of whether removal is proper where the removing party is the plaintiff, if the joinder requirements of 28 U.S.C. § 1446 are applicable and all defendants did not join in the petition, then the action was not properly removed.

The Distict Court held that notwithstanding 28 U.S.C. § 1446, the FDIC may remove the instant action under

12 U.S.C. § 1819 since, in its view, all applicable procedural requirements for removal were followed (A67-A68). In so holding, the District Court concluded that 12 U.S.C. § 1819 is a special removal statute designed to give special removal rights to the FDIC and that by reason thereof, the requirement that all defendants join a removal petition as provided in 28 U.S.C. § 1446, was not a part of the applicable "procedure for removal" referred to in 12 U.S.C. § 1819 (A66-A68). In support of this proposition, the District Court found that 12 U.S.C. § 1819 was analogous to another special removal statute -- 28 U.S.C. § 1442 -- which permits removal at the sole behest of a federal officer. Thus, the District Court reasoned that 12 U.S.C. § 1819 creates a removal right analogous to that of 28 U.S.C. § 1442 and that, therefore, the requirement that all defendants join in the removal petition did not apply (A66-A68).

Despite the District Court's reasoning, a strong argument can be made that the joinder of all defendants in the removal petition was necessary here. While research has failed to uncover any cases interpreting the "procedural requirements" referred to in 12 U.S.C. § 1819, in those cases where, as here, the asserted ground for removal was the existence of a Federal question jurisdiction, the courts have required that all defendants join in the removal petition.

See, e.g., In re Dunn, supra, at 386; Chicago, R.I. & P.R. v. Martin, supra, at 248; Bradford v. Harding, supra, at 309; Sheets v. Shamrock Oil & Gas Corp., supra, at 115 F.2d 883 aff'd 313 U.S. at 105-107 (separate opinion); Bailen v. Deitrick, supra, at 376; Grenchik v. Mandel, supra, at 1299, 1300; Van Slambrouck v. Employers Mutual Liability Insurance Co., supra, at 368. As this Court declared in Bradford v. Harding, supra, at 309:

> Plaintiff bases his appeal on the long line of decisions that where removal is sought to be effected under the provisions of 28 U.S.C. § 1441(a), and its predecessors, whereby "any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants ***," all the defendants must join in seeking removal. This is so whether the ground of removal is diversity, Fletcher v. Hamlet, 1886, 116 U.S. 408, 6 S. Ct. 426, 29 L.Ed. 679, or the existence of a federal question, Chicago, Rock Island and Pacific Ry. Co. v. Martin, 1900, 178 U.S. 245, 20 S. Ct. 854, 44 L.Ed. 1055. (Emphasis supplied.)

Further, it is submitted that that rule of law permitting removal of actions without the consent of all defendants in suits against federal officers or agencies being sued as a result of their official acts, which rule is incorporated in 28 U.S.C. § 1442, is predicated upon uniquely compelling policy considerations which are not present in the case at bar. Thus, the District Court's

analogy of the removal right under 28 U.S.C. § 1819 to the removal right of 28 U.S.C. § 1442 would not appear to be valid. For example, in the landmark case of Tennessee v. Davis, 100 U.S. 257, 263 (1879), Justice Strong set forth the practical reasons underlying the original predecessor of 28 U.S.C. § 1442:

> It [the Federal Government] can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested, and brought to trial in a State Court, for an alleged offense against the law of the State, yet warranted by the federal authority they possess, and if the General Government is powerless to interfere at once for their protection; if their protection must be left to the action of the State Court; the operations of the General Government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to act done under . . . its laws . . . . The State Court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the state court, the case can be brought into the United States Court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested.
>
> We do not think such an element of weakness is to be found in the Constitution . . . .

Further, Chief Justice Taft, in Maryland v. Soper (No. 1) 270 U.S. 9, 32 (1926), stated:

> The constitutional validity of the section [the predecessor of present 28 U.S.C. § 1442(a)] rests on the right and power of the United States to secure the efficient execution of its laws and to prevent interference therewith . . . .

And this Court, in Bradford v. Harding, supra, at 310 also recognized this strong policy consideration:

> [T]he policy of [28 U.S.C. § 1442] would be frustrated if a plaintiff or a prosecutor, by joining non-federal defendants with no desire to remove, could retain the suit in a tribunal that might "administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government."

Unlike the threat seen by Mr. Justice Strong in Tennessee v. Davis, supra, there is no claim here that state courts or state law may be "unfriendly" to the FDIC because of its Federal status. Nor is it claimed that the prosecution of the instant action in state court will be conducted in such "a manner as to paralyze the operations of the government" as is or may be the case in actions which have been held removable at the instance of a Federal party alone under 28 U.S.C. § 1442. Moreover, there is nothing remotely Federal about the case at bar. Trial in the state court will have no impact on the right and power of the United States to secure the efficient execution of its laws, free from interference.

Furthermore, even though the FDIC can be classified as a "Federal" party, there are no substantial reasons why this Court should not apply the settled procedural requirements for removal and require all defendants to join in the FDIC's removal petition. In contrast to a situation in which a state court might be required to pass upon questions involving the integrity of our Federal system or to apply Federal law, see e.g., Maryland v. Soper, supra, 270 U.S. at 32, the instant case will require the construction and application of state law in an unsettled area. It is clearly the policy of this Circuit to favor state court determination of complex issues of state law whenever possible. See, e.g., Modave v. Long Island Jewish Medical Center, 501 F.2d 1065, 1067 (2d Cir. 1974); East Hampton DeWitt Corp. v. State Farm Mutual Automobile Ins. Co., 490 F.2d 1234, 1236 (2d Cir. 1973).

* * *

In sum, it is questionable whether the District Court was correct in refusing to apply the basic principle that an action otherwise removable from the state court to the Federal court may not be so removed unless all defendants join in the petition to remove. If this Court determines that such requirement is applicable to the FDIC's removal petition, then the order below denying remand must

be reversed and this action must be remanded to the Supreme Court, New York County.

POINT II

IT IS QUESTIONABLE WHETHER THE DISTRICT COURT WAS CORRECT IN HOLDING THAT 12 U.S.C. § 1819 ALLOWS REMOVAL BY THE FDIC WHERE IT IS A PARTY-PLAINTIFF.

As noted, on December 5, 1974 the FDIC, as a receiver of Franklin Bank, was substituted as a defendant in place of Franklin Bank, the derivative corporation on whose behalf the shareholder-plaintiff commenced this action (A26, A62). As substituted defendant for Franklin Bank in this derivative action, the FDIC was only a nominal defendant, but in substance was the real party-plaintiff. See, e.g. Koster v. Lumbermens Mutual Co., 330 U.S. 518, 522 (1947); Meyer v. Fleming, 327 U.S. 161, 167 (1946); In re Penn Central Securities Litigation, 335 F. Supp. 1026, 1037-1038 (E.D. Pa. 1971). On December 12, 1974, the FDIC removed this action to the United States District Court for the Southern District of New York (A21-A25, A62). Thus, in effect, the FDIC removed this action as a party-plaintiff. The FDIC's status as party-plaintiff was formalized when, prior to denial of the remand motion, the District Court granted the

FDIC's motion to be realigned as a party-plaintiff and vested to it the exclusive control over prosecution of the claims asserted on behalf of Franklin Bank.

It is well settled that the right of removal is ordinarily confined to a defendant or defendants. See, e.g., Sheets v. Shamrock Oil & Gas Corp., supra; Conner v. Salzinger, 457 F.2d 1241, 1243 (3d Cir. 1972); In re Walker, 375 F.2d 678 (9th Cir. 1967); Coastal Air Service, Inc. v. Tarco Aviation Service, Inc., 301 F. Supp. 586, 588 (S.D. Ga. 1969). No right exists in favor of a person who, as plaintiff, has filed an action in the state court, to cause the removal of such action to a Federal court. See 28 U.S.C. §§ 1441(a), 1443, 1446; 1A J. Moore, Federal Practice, ¶ 0.157[7] at 114 et seq. (2d ed. 1974). Notwithstanding these fundamental principles, the District Court held that 12 U.S.C. § 1819 is a special removal statute which gives the FDIC the right to remove any civil action to which the FDIC is "a party"(A66-A68) and that consequently, removal by FDIC as a party-plaintiff was proper.

It is submitted that in determining the question as to whether the FDIC is entitled, under 12 U.S.C. § 1819,

to remove this action as a party-plaintiff, reference to 28 U.S.C. § 1446 and also to other removal statutes such as 28 U.S.C. §§ 1441 and 1442 is necessary. Thus, 12 U.S.C. § 1819 provides in pertinent part:

> All suits of a civil nature at common law or in equity to which the [FDIC] shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy . . . .
> (Emphasis added)

This portion of the statute creates federal question jurisdiction anytime the FDIC is a "party" to a civil action. Federal Deposit Ins. Corp. v. National Sur. Corp., 345 F. Supp. 885, 888 (D. Iowa, 1972); DeLorenzo v. Federal Deposit Ins. Corp., 259 F. Supp. 193, 195 n.4 (S.D.N.Y.), opinion on reargument adhered to, 268 F. Supp. 378 (S.D.N.Y. 1966). It does not purport to grant to the FDIC the right to remove any action to which it is a "party." Rather, it would appear that the purpose of such language is merely to grant Federal subject matter jurisdiction in actions where the FDIC is a "party". Cf. Hancock Financial Corp. v. Federal Savings & L. Ins. Corp., 492 F.2d 1325, 1328 n.2 (9th Cir. 1974). But cf. Federal Savings & L. Ins. Corp. v. Quinn, 419 F.2d 1014, 1019 (7th Cir. 1969).

cf. Federal Savings & L. Ins. Corp. v. Krueger, 435 F.2d 633, 635, 636 (7th Cir. 1970); Federal Savings & L. Ins. Corp. v. Quinn, 419 F.2d 1014, 1019 (7th Cir. 1969).

12 U.S.C. § 1819 further provides:

> [A]nd the [FDIC] may, without bond or security, remove any such action, suit or proceeding from a State court to the United States district court for the district or division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect . . . . (Emphasis added)

The District court held that the phrase "any such action" entitles the FDIC to remove any action to which it is a "party" either as defendant or plaintiff (A67). Such conclusion, however, disregards the statute's requirement that in order to remove any action, the FDIC must follow "any procedure for removal now or hereafter in effect." As previously set forth above, see pp. 17-19, supra, the only "procedure for removal" set forth in the United States Code is that set forth in 28 U.S.C. § 1446. 28 U.S.C. § 1446(a) limits removal to:

> A defendant or defendants desiring to remove any civil action . . . .

28 U.S.C. § 1446 does not provide for removal by a plaintiff.

§ 1819 and confines the FDIC's right to remove to those actions wherein it is a party-defendant. This limitation is consistent with the limitation contained in 28 U.S.C. §1441 (the general removal statute) as well as 28 U.S.C. § 1442 (a special removal statute) which permits removal only by a defendant or defendants.

In support of its holding that the FDIC could remove this action as party plaintiff, the District Court also relied on Federal Savings & L. Ins. Corp. v. Quinn, supra, which involved a removal statute, 12 U.S.C. § 1730(k)(1), a statute parallel to 12 U.S.C. § 1819. This District Court stated:

> There [in Quinn] the issue was whether a counterclaim brought after the corporation sued in the state Court could be removed to the federal court. The Court recognized that generally a defendant on a counterclaim is not a defendant for removal purposes. Barrow v. Hunton, 99 U.S. 80 (1879). However, since the FSLIC statute, like the FDIC statute, permitted removal of any suit to which the corporation was "a party," the removal was held proper. The issue in the Quinn case was not the precise issue presented here, but Quinn confirms that the normal limitations need not apply to special statutes. (Emphasis supplied.)
>
> (A66-A67)

The Quinn case is distinguishable from the instant case. The court in Quinn was not called upon to consider the issue present here as to whether a Federal party-plaintiff against whom no claim has been asserted, may, without more, cause the removal of an action. In Quinn, the Federal party was exposed to a counterclaim which if successful would have caused dimunition of the Federal Treasury. Thus, the Quinn case involved issues analogous to those presented in actions which are removable pursuant to 28 U.S.C. § 1442, i.e., actions which are brought against a Federal officer. Clearly the Federal party in Quinn was entitled to a Federal forum. There is no comparable justification for allowing removal of this action.

Moreover, the lack of any claim against the FDIC highlights the inapplicability to this action of the policies underlying removal. Those policies permit a Federal agency or officer, in certain circumstances, to choose the forum in which to defend claims asserted against them. See e.g., 28 U.S.C. § 1442. Removal is not permitted merely because a plaintiff, against whom no claim is asserted, decides to alter the forum of already pending litigation from a state court, which was voluntarily chosen as the forum, to a Federal court. See e.g., Sheets v. Shamrock Oil & Gas Corp., supra, at 115 F.2d 883, aff'd, 313 U.S. at 105, 106 (separ-

ate opinion); West v. The City of Aurora, 73 U.S. 139 (1868). So far as the right of removal is concerned, the FDIC, as the real party-plaintiff who acceded to the exclusive control over the prosecution of the claims asserted on behalf of Franklin Bank should be subject to the same kind of removal limitations as the original plaintiff, whose place it voluntarily took. Cf. e.g., Speckert v. German National Bank, 98 F. 151, 154 (6th Cir. 1899); Burnham v. First National Bank of Leoti, 53 F. 163, 166 (8th Cir. 1892); Oster v. Rubenstein, 136 F. Supp. 733, 734 (S.D.N.Y. 1955). Thus, since the FDIC has chosen to take over the prosecution of this derivative action from the shareholder plaintiff, rather than to initiate an independent action, it should be bound by the choice of forum selected by the derivative plaintiff.

* * *

In sum, a substantial question exists as to whether, as held by the District Court, 12 U.S.C. § 1819 creates a removal right in the FDIC which overrides the basic principle that the right of removal is confined to a defendant or defendants. It would appear that the express requirement of 12 U.S.C. § 1819 that "the procedure for removal now or hereafter in effect" be followed in order to effectu-

ate removal confines the FDIC's right of removal to those actions wherein it is a party-defendant. If so, then FDIC as a realigned party-plaintiff should not have been permitted to remove this action and the motion to remand should have been granted.

Conclusion

This Court should determine whether under the circumstances herein, removal was proper and whether the District Court has jurisdiction over this action. If it is determined that removal was improper and no jurisdiction exists, the order of the District Court denying the motion to remand should be reversed and this action should be remanded to Supreme Court, New York County.

Dated: New York, New York
September 8, 1975

Respectfully submitted,

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ADDENDUM

Statutes Involved

Title 28 of United States Code

§ 1441. Actions removable generally

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise non-removable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

§ 1442. Federal officers sued or prosecuted

(a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

(2) A property holder whose title is derived from any such officer, where such action or prosecution affects the validity of any law of the United States.

(3) Any officer of the courts of the United States, for any Act under color of office or in the performance of his duties;

(4) Any officer of either House of Congress, for any act in the discharge of his official duty under an order of such House.

(b) A personal action commenced in any State court by an alien against any citizen of a State who is, or at the time the alleged action accrued was, a civil officer of the United States and is a non-resident of such State, wherein jurisdiction is obtained by the State court by personal service of process, may be removed by the defendant to the district court of the United States for the district and division in which the defendant was served with process.

§ 1446. Procedure for removal

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

(b) The petition for removal of a civil action or proceeding shall be filed within thirty days after the receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based, or within thirty days after the service of summons upon the defendant if such initial pleading has then been filed in court and is not required to be served on the defendant, whichever period is shorter.

If the case stated by the initial pleading is not removable, a petition for removal may be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of an amended pleading, motion, order or other paper from which it may first be ascertained that the case is one which is or has become removable.

(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed.

(e) Promptly after the filing of such petition and bond the defendant or defendants shall give written notice thereof to all adverse parties and shall file a copy of the petition with the clerk of such State court, which shall effect the removal and the State court shall proceed no further unless and until the case is remanded.

(f) If the defendant or defendants are in actual custody on process issued by the State court, the district court shall issue its writ of habeas corpus, and the marshal shall thereupon take such defendant or defendants into his custody and deliver a copy of the writ to the clerk of such State court. As amended May 24, 1949, c. 139, § 83, 63 Stat. 101; Sept. 29, 1965, Pub.L. 89-215, 79 Stat. 887.

§ 1819. Incorporation; powers; seal

Upon June 16, 1933, the Corporation shall become a body corporate and as such shall have power—

* * *

Fourth. To sue and be sued, complain and defend, in any court of law or equity, State or Federal. All suits of a civil nature at common law or in equity to which the Corporation shall be a party shall be deemed to arise under the laws of the United States, and the United States district courts shall have original jurisdiction thereof, without regard to the amount in controversy; and the Corporation may, without bond or security, remove any such action, suit, or proceeding from a State court to the United States district court for the district or division embracing the place where the same is pending by following any procedure for removal now or hereafter in effect, except that any such suit to which the Corporation is a party in its capacity as receiver of a State bank and which involves only the rights or obligations of depositors, creditors, stockholders, and such State bank under State law shall not be deemed to arise under the laws of the United States. No attachment or execution shall be issued against the Corporation or its property before final judgement in any suit, action, or proceeding in any State, county, municipal, or United States court. The Board of Directors shall designate an agent upon whom service of process may be made in any State, Territory, or jurisdiction in which any insured bank is located.

Copy received
Nupte Hubbard Reed
b 30 September 8, 1975